United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

B
P/S

74-1878

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

THEODORE KOSS and KOSS SECURITIES CORPORATION,

Defendants-Appellants.

Docket No.
74-1378

APPELLANTS' REPLY BRIEF

MORRIS WEISSBERG
Attorney for Appellants
15 Park Row
New York, New York 10038
212 964-0492

INDEX TO REPLY BRIEF

CASE CITED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA,
Appellee

: Docket #74-1878

-against-

THEODORE KOSS and KOSS SECURITIES CORPORATION,
Defendants-Appellants.

- x

APPELLANTS' REPLY BRIEF

POINT I (Continued)

THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE KOSS DEFENDANTS OF CONSPIRACY TO VIOLATE THE SECURITIES LAWS, AND MAIL FRAUD.

I.

The Government's brief argued (p. 23):

"The Government's evidence was that Koss first participated in the conspiracy when, Koss and Zardus having been unable to sell 65,000 shares, Murray Levine entered into an agreement on Koss' behalf with Hellerman that if Hellerman would successfully complete the offering Koss would not 'back-door' the 15,000 shares he had sold, which would be transferred to the Hellerman group for $1-½ per share as part of the arrangement to give Hellerman complete control of the market in Automated shares."

(emphasis supplied)

The record shows that while Hellerman testified that Murray Levine entered into such an agreement on Koss' behalf, Murray Levine testified that he made no such agreement on Koss' behalf.

Murray Levine testified on direct examination (A91-92):

"Q At or about that time in January, did you have a conversation with Mr. Koss about Automated? A Yes.

Q What did you say and what did he say and where was the conversation held?

A It was one night at dinner at a restaurant close to the office, Bonapart's, and I told him I had an interest in putting away, or retailing and interesting other people in the entire 60,000 shares, but I wanted 100 per cent of the selling commission, which was approximately $6,000.

Q Do you recall how much the offering was?
A 60,000 shares at $1 a share.

Q What, if anything, did Mr. Koss say in return?
A He turned me down entirely."

Later in January, 1971, Murray Levine talked to Hellerman and Taylor about Automated, as follows (A94):

"Q What else was said, Mr. Levine?
A I told him I could not vouch at that point for Mr. Koss' relinquishing his customers 15,000 shares and I had thought at that point that Mr. Santis and Mr. Koss -- he was speaking to Mr. Koss -- can have him agree to the relinquishing of the stock he held in his own customers' accounts."

On cross-examination, Murray Levine repeated his above-quoted testimony; and he contradicted Hellerman's testimony that on Koss' behalf Murray Levine agreed with Hellerman that Koss would sell his customers' 15,000 shares of Automated to Hellerman for $1.50 per share, and that Koss would cooperate in Hellerman's control of the market in Automated. Thus, Murray Levine testified (A97):

"Q In any of your conversations with Mr. Hellerman, did you say to Mr. Hellerman that you guaranteed to Mr. Hellerman that Koss will not sell into the market the 15,000 shares that he had sold to his customers?

* * *

A To the best of my recollection I said to Mr. Hellerman I did not make the deal with Koss to return the 15,000 shares it was done by Mr. Santis. So I could not guarantee what Mr. Koss would do.

Q Your answer is then that you did not say that to Mr. Hellerman?
A To the best of my recollection, no sir."

Robert Santis, the president of Automated, testified that he did not make a deal with Koss to sell to Hellerman the 15,000 shares of Koss' customers; and that Koss had no knowledge of Hellerman's proposed activities in the underwriting and distribution of shares of Automated; and that Koss kept asking about Hellerman until about March 11, 1971, when Koss gave Santis a check for the $12,750 proceeds of subscription to 15,000 shares of Automated, at which time Santis told Koss that Hellerman "was involved in the deal" (A105).

Santis testified on direct examination (A105-106):

> "Q Mr. Santis, going back now to the time that you received the money from Mr. Koss, the $12,750, on or about that time did Mr. Hellerman's name come up in the conversation with Mr. Koss?
> A Yes. *** Mr. Koss did not know of Mr. Hellerman's involvement at the meeting in Mr. Turchin's office in early March, by the time he gave me the check or thereabouts. He knew that Hellerman was involved in the deal.
>
> Q How did you know that?
> A We talked about it.
>
> Q Tell us what Koss said.
> A He said he knows Hellerman, he knows his reputation, he knows he is a stock manipulator.
>
> * * *
>
> THE COURT: And this is the first time, to your knowledge, that Koss knew that Hellerman was involved?
> THE WITNESS: Yes."

II.

The Government's brief recognized the mathematical correctness of the tabulations on pages 14-15 of Koss's main brief, by stating (p. 25):

> "Koss' records showed he purchased 4,000 shares from customers from March 23 to April 20."

This is necessarily an admission that around April 23,

1971, the co-defendant, Erwin Layne, could not have taken from Koss stock certificates for 5,000 shares of Automated and brought them back to Hellerman, because Koss only bought 4,000 shares. Moreover, Koss sold 2,500 shares, so that he only had 1,500 shares left around April 23, 1971.

The Government argued (p. 25):

> " *** Saxon testified he never bought any stock from Koss, so the 1,000 shares transferred from Dugan's account to Saxon's account were available to Koss."

But Saxon gave Murray Taylor a check signed by Saxon in blank, drawn on Saxon's account in the Canadian Imperial Bank branch in the Bahamas, in which Saxon had $100 on deposit (Koss Exhibit F; T1284). Taylor filled in that check for $780 and gave it to Koss to pay for shares Taylor bought from Koss in Saxon's name. Payment of the check was refused for insufficient funds. (T1284).

Thus, Saxon made it possible for Taylor to buy stock from Koss in Saxon's name, by signing this blank check and giving it to Taylor.

Moreover, in compliance with S.E.C.'s request, Koss later mailed to S.E.C. his firm's check to Dugan for $3,852.50, paying Dugan $4.00 per share for his 1,000 shares sold to Saxon (Koss Exhibit i for identification).

Obviously, Koss would not pay Dugan $4.00 per share, and re-sell such shares to Hellerman, in Saxon's name, for $1.50 per share; and Koss' records show a sale by Dugan to Saxon of 1,000 shares for $4.00 per share. (Govt. Exh. 2cc).

III.

The Government argued (p. 26):

> "Finally, Koss claims he did not have the requisite 'stake in the outcome' of the conspiracy. That claim does not take cognizance of the fact that Koss would have had to return all moneys to subscribers if Hellerman had not completed the offering, which enabled Koss to earn his underwriters' compensation of $2,250."

But the underwriter's compensation of $2,250 was not a "stake in the outcome" of the conspiracy charged in the indictment to raise the price of shares of Automated; to sell such shares to buyers by means of fraudulent statements; and to violate the securities laws and the mail fraud laws in carrying out such conspiracy (A4-5).

The outcome of that conspiracy, sought by Hellerman and his associates, was profits from fraudulent sales of securities, and not compensation to a stock broker for acting as an underwriter.

The Government argued further (p. 26):

> "Koss eventually insisted on keeping 5,000 Automated shares so that he too could profit from the Automated manipulation."

But we showed supra, pp. 3-4, and in our main brief, pp. 14-21, that instead of keeping 5,000 shares, Koss bought 4,000 shares and sold 2,500 shares, and he had 1,500 shares left on April 20, 1971. This disproves Hellerman's testimony that Koss asked to keep 5,000 shares.

POINT IV (continued)

THE EVIDENCE WAS INSUFFICIENT TO CONVICT KOSS OF FAILURE TO DEPOSIT IN ESCROW MONEY RECEIVED IN THE ALL OR NOTHING OFFERING OF SECURITIES.

The Government argued (p. 27):

"While the Government did not prove exactly when Koss was paid for those shares the Government did prove that Koss received two checks (GXs 31(b) and 34) in January, and that no deposits were made into the escrow account between December 31, 1970 and March 4, 1971."

Government exhibit 31-b was a check for $300, dated January 21, 1971, by Leonard Reisch to Koss Sec.Corp. (T591).

Government exhibit 34 was a check for $1,225, dated January 7, 1971, by Charles Gols to Koss Sec. Corp. Only $600 of such $1,225 was given to pay for shares of Automated, the remaining $625 was given to pay for another stock (T761).

Those two checks, received in January, 1971, totaling $900, were more than covered in the escrow account by the $3,000 which Koss deposited therein on December 30, 1970.

The Government presented no evidence that the $3,000 which Koss deposited in his escrow account on December 30, 1970 was a deposit of money received before December 30, 1970 in payment of subscriptions to shares of Automated.

Moreover, the tabulations in our main brief (p. 36) show that the evidence in the record is that between December 16, 1970 and March 2, 1971, Koss received $2,600 in payment for subscriptions to shares of Automated, including the aforesaid two checks totaling $900. Therefore, such entire $2,600 was more than covered by Koss' $3,000 escrow deposit on December 30, 1970.

POINT VI (continued)

THE INDICTMENT SHOULD HAVE BEEN DISMISSED FOR ENTRAPMENT, AS A MATTER OF LAW, WITHOUT SUBMITTING THE ISSUE OF ENTRAPMENT TO THE JURY.

Koss did not ask the Trial Court to submit the issue of entrapment to the jury, because such a submission would imply to the jury that Koss had knowledge of Hellerman's conspiracy, including knowledge of forgeries of the signatures on the stock certificates which Koss guaranteed; and it would imply to the jury that Koss knowingly and willingly participated in Hellerman's conspiracy.

In our main brief, pp. 29-31, we showed that the jury ascribed guilt to Koss for Hellerman's frauds, deeming Koss a part of Hellerman's conspiracy, based on evidence that Koss sold shares to Interstate Equities which Hellerman controlled; evidence that Koss guaranteed forged signatures on stock certificates issued to names taken from telephone directories; and evidence that Koss did the other things listed on page 28 of our main brief.

Koss contended at the trial, and on this appeal, that he did not know of forgeries of the signatures on the stock certificates which he guaranteed; and that he did not knowingly join and participate in Hellerman's conspiracy.

Therefore, Koss contends that the actions of the Government informants, Hellerman and Taylor, in themselves committing the crimes charged in the indictment, requires dismissal of the indictment, as a matter of law, because of such criminal actions by these Government informants, regardless of whether Koss had a

predisposition to join them in committing these crimes, or whether they overcame his scruples and induced him to do so.

In Sherman v. United States, 356 U.S. 369 (1957), a concurring opinion by Mr. Justice Frankfurter, in which Justices Douglas, Harlan and Brennan concurred, stated (pp. 382-383):

> " *** a test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society."

Moreover, there was no evidence that Koss had inclinations to criminality. He had never been convicted of a crime. He had a clean record as a business man, and a family man, he was active in his church. A local business man, and the minister of his church testified to his good reputation in the community (T1695-96; 1858-59).

In the Sherman case, supra, Sherman had two prior convictions for selling and for possessing narcotics. Yet, the Court held that the Government informant entrapped Sherman, as a matter of law, requiring dismissal of the indictment. The Court said (356 U.S. at 375-376):

> " *** a nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time Kalchinian approached him, particularly when we must assume from the record he was trying to overcome the narcotics habit at the time.
>
> The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time,

"the informer then tells the government agent. The set-up is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this."

It is immaterial that the Assistant United States Attorney told Hellerman (A86):

" *** that I could watch the deal and not to do anything wrong in the deal, not participate, just watch it *** ."

Hellerman's and Taylor's non compliance with these Government instructions did not relieve the Government of entrapment responsibility for Hellerman's and Taylor's criminal actions in formulating and taking charge of carrying out the conspiracy charged in the indictment.

In the Sherman case, supra, the Court said (pp. 373-374):

"The Government cannot disown Kalchinian and insist it is not responsible for his actions. Although he was not being paid, Kalchinian was an active government informer who had but recently been the instigator of at least two other prosecutions. Undoubtedly, the impetus for such achievements was the fact that in 1951 Kalchinian was himself under criminal charges for illegally selling narcotics and had not yet been sentenced."

POINT VII (continued)

KOSS WAS SURPRISED AND PREJUDICED BY INSUFFICIENT PRE-TRIAL DISCLOSURE OF GOVERNMENT DOCUMENTS AND TRANSACTIONS, WHICH WERE NOT ALLEGED IN THE INDICTMENT, OR IN THE BILLS OF PARTICULARS.

The Government argued (p. 31):

"Specifically Koss claims he was not informed that the following would be proved against him at the trial: selling 10,000 shares to Hellerman; guaranteeing forged signatures on stock certificates; knowledge of Santis' kick-back to Hellerman; and cashing a forged check for Hellerman. The denial of the portions of his motion for a bill of particulars now complained of would not have informed Koss that the Government would prove he sold 10,000 shares to Hellerman."

Koss would have been informed of the Government's claim that he sold 10,000 shares to Hellerman, if it had given him the information requested in par. 7d of his demand for a bill of particulars, in which he asked whether the Government claims that he received from any person any money or property "other than the consideration provided in the underwriting agreement".

The Government presented evidence at the trial that Hellerman paid Koss $1.50 per share for 10,000 shares; that Hellerman also paid Koss $500 for guaranteeing forged signatures on stock certificates; and that for cashing 3 checks at Koss' bank, Hellerman paid Koss 1% of the face amount of such checks, which were payable to stockholders whose names were taken from telephone directories, and their endorsements on such checks were forged.

Denial of Koss' request in par. 9b for a record of each sale of shares by Hellerman, Taylor, Zardus, and Interstate Equity left Koss without information at the trial to deal with Zardus' records in evidence of alleged transactions between Koss and his firm, Interstate Equity.

Denial of Koss' request in par. 11(f) for information about "checks drawn by Interstate Equity Corporation to order of persons unknown" left Koss without information at the trial to deal with evidence that such checks were issued to names taken from telephone directories, whose endorsements on such checks were forged.

Koss was surprised and prejudiced by such evidence of which he received no pre-trial disclosure. In the pressures of a trial which lasted 13 days, there was no possibility of investigating and ascertaining the facts about such evidence.

The trial went very fast. Many Government exhibits were shown to counsel for only a fleeting moment before they were taken back by Government counsel, so that Koss' lawyer had no opportunity to inform himself of the text or subject matter of such exhibits, or even of the exhibit numbers.

The Government also argued (p. 31):

> " *** the indictment clearly stated that, as means of the conspiracy, signatures were forged on stock certificates and checks *** ."

There is not a word in the indictment, or in the bills of particulars, that signatures were forged on stock certificates and checks.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED, AND THE INDICTMENT SHOULD BE DISMISSED, OR A NEW TRIAL SHOULD BE GRANTED.

October 9, 1974.

Respectfully submitted,

N. GEORGE TURCHIN
of counsel

MORRIS WEISSBERG
Attorney for Appellant.

INDEX TO REPLY BRIEF

CASE CITED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

-against-

THEODORE KOSS and KOSS SECURITIES CORPORATION,
Defendants-Appellants.

Docket #74-1878

APPELLANTS' REPLY BRIEF

POINT I (Continued)

THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE KOSS DEFENDANTS OF CONSPIRACY TO VIOLATE THE SECURITIES LAWS, AND MAIL FRAUD.

I.

The Government's brief argued (p. 23):

"The Government's evidence was that Koss first participated in the conspiracy when, Koss and Zardus having been unable to sell 65,000 shares, Murray Levine entered into an agreement on Koss' behalf with Hellerman that if Hellerman would successfully complete the offering Koss would not 'back-door' the 15,000 shares he had sold, which would be transferred to the Hellerman group for $1-½ per share as part of the arrangement to give Hellerman complete control of the market in Automated shares."

(emphasis supplied)

The record shows that while Hellerman testified that Murray Levine entered into such an agreement on Koss' behalf, Murray Levine testified that he made no such agreement on Koss' behalf.

Murray Levine testified on direct examination (A91-92):

"Q At or about that time in January, did you have a conversation with Mr. Koss about Automated? A Yes.

Q What did you say and what did he say and where was the conversation held?

A It was one night at dinner at a restaurant close to the office, Bonapart's, and I told him I had an interest in putting away, or retailing and interesting other people in the entire 60,000 shares, but I wanted 100 per cent of the selling commission, which was approximately $6,000.

Q Do you recall how much the offering was?
A 60,000 shares at $1 a share.

Q What, if anything, did Mr. Koss say in return?
A He turned me down entirely."

Later in January, 1971, Murray Levine talked to Hellerman and Taylor about Automated, as follows (A94):

"Q What else was said, Mr. Levine?
A I told him I could not vouch at that point for Mr. Koss' relinquishing his customers 15,000 shares and I had thought at that point that Mr. Santis and Mr. Koss -- he was speaking to Mr. Koss -- can have him agree to the relinquishing of the stock he held in his own customers' accounts."

On cross-examination, Murray Levine repeated his above-quoted testimony; and he contradicted Hellerman's testimony that on Koss' behalf Murray Levine agreed with Hellerman that Koss would sell his customers' 15,000 shares of Automated to Hellerman for $1.50 per share, and that Koss would cooperate in Hellerman's control of the market in Automated. Thus, Murray Levine testified (A97):

"Q In any of your conversations with Mr. Hellerman, did you say to Mr. Hellerman that you guaranteed to Mr. Hellerman that Koss will not sell into the market the 15,000 shares that he had sold to his customers?

* * *

A To the best of my recollection I said to Mr. Hellerman I did not make the deal with Koss to return the 15,000 shares it was done by Mr. Santis. So I could not guarantee what Mr. Koss would do.

Q Your answer is then that you did not say that to Mr. Hellerman?
A To the best of my recollection, no sir."

Robert Santis, the president of Automated, testified that he did not make a deal with Koss to sell to Hellerman the 15,000 shares of Koss' customers; and that Koss had no knowledge of Hellerman's proposed activities in the underwriting and distribution of shares of Automated; and that Koss kept asking about Hellerman until about March 11, 1971, when Koss gave Santis a check for the $12,750 proceeds of subscription to 15,000 shares of Automated, at which time Santis told Koss that Hellerman "was involved in the deal" (A105).

Santis testified on direct examination (A105-106):

"Q Mr. Santis, going back now to the time that you received the money from Mr. Koss, the $12,750, on or about that time did Mr. Hellerman's name come up in the conversation with Mr. Koss?
A Yes. *** Mr. Koss did not know of Mr. Hellerman's involvement at the meeting in Mr. Turchin's office in early March, by the time he gave me the check or thereabouts. He knew that Hellerman was involved in the deal.

Q How did you know that?
A We talked about it.

Q Tell us what Koss said.
A He said he knows Hellerman, he knows his reputation, he knows he is a stock manipulator.

* * *

THE COURT: And this is the first time, to your knowledge, that Koss knew that Hellerman was involved?
THE WITNESS: Yes."

II.

The Government's brief recognized the mathematical correctness of the tabulations on pages 14-15 of Koss's main brief, by stating (p. 25):

"Koss' records showed he purchased 4,[illegible] shares from customers from March 23 to Ap[illegible]20."

This is necessarily an admission that around April 23,

1971, the co-defendant, Erwin Layne, could not have taken from Koss stock certificates for 5,000 shares of Automated and brought them back to Hellerman, because Koss only bought 4,000 shares. Moreover, Koss sold 2,500 shares, so that he only had 1,500 shares left around April 23, 1971.

The Government argued (p. 25):

> " *** Saxon testified he never bought any stock from Koss, so the 1,000 shares transferred from Dugan's account to Saxon's account were available to Koss."

But Saxon gave Murray Taylor a check signed by Saxon in blank, drawn on Saxon's account in the Canadian Imperial Bank branch in the Bahamas, in which Saxon had $100 on deposit (Koss Exhibit F; T1284). Taylor filled in that check for $780 and gave it to Koss to pay for shares Taylor bought from Koss in Saxon's name. Payment of the check was refused for insufficient funds. (T1284).

Thus, Saxon made it possible for Taylor to buy stock from Koss in Saxon's name, by signing this blank check and giving it to Taylor.

Moreover, in compliance with S.E.C.'s request, Koss later mailed to S.E.C. his firm's check to Dugan for $3,852.50, paying Dugan $4.00 per share for his 1,000 shares sold to Saxon (Koss Exhibit 1 for identification).

Obviously, Koss would not pay Dugan $4.00 per share, and re-sell such shares to Hellerman, in Saxon's name, for $1.50 per share; and Koss' records show a sale by Dugan to Saxon of 1,000 shares for $4.00 per share. (Govt. Exh. 2cc).

III.

The Government argued (p. 26):

> "Finally, Koss claims he did not have the requisite 'stake in the outcome' of the conspiracy. That claim does not take cognizance of the fact that Koss would have had to return all moneys to subscribers if Hellerman had not completed the offering, which enabled Koss to earn his underwriters' compensation of $2,250."

But the underwriter's compensation of $2,250 was not a "stake in the outcome" of the conspiracy charged in the indictment to raise the price of shares of Automated; to sell such shares to buyers by means of fraudulent statements; and to violate the securities laws and the mail fraud laws in carrying out such conspiracy (A4-5).

The outcome of that conspiracy, sought by Hellerman and his associates, was profits from fraudulent sales of securities, and not compensation to a stock broker for acting as an underwriter.

The Government argued further (p. 26):

> "Koss eventually insisted on keeping 5,000 Automated shares so that he too could profit from the Automated manipulation."

But we showed supra, pp. 3-4, and in our main brief, pp. 14-21, that instead of keeping 5,000 shares, Koss bought 4,000 shares and sold 2,500 shares, and he had 1,500 shares left on April 20, 1971. This disproves Hellerman's testimony that Koss asked to keep 5,000 shares.

POINT IV (continued)

THE EVIDENCE WAS INSUFFICIENT TO CONVICT KOSS OF FAILURE TO DEPOSIT IN ESCROW MONEY RECEIVED IN THE ALL OR NOTHING OFFERING OF SECURITIES.

The Government argued (p. 27):

"While the Government did not prove exactly when Koss was paid for those shares the Government did prove that Koss received two checks (GXs 31(b) and 34) in January, and that no deposits were made into the escrow account between December 31, 1970 and March 4, 1971."

Government exhibit 31-b was a check for $300, dated January 21, 1971, by Leonard Reisch to Koss Sec.Corp. (T691).

Government exhibit 34 was a check for $1,225, dated January 7, 1971, by Charles Gols to Koss Sec. Corp. Only $600 of such $1,225 was given to pay for shares of Automated, the remaining $625 was given to pay for another stock (T761).

These two checks, received in January, 1971, totaling $900, were more than covered in the escrow account by the $3,000 which Koss deposited therein on December 30, 1970.

The Government presented no evidence that the $3,000 which Koss deposited in his escr[illegible]account on December 30, 1970 was a deposit of money received before December 30, 1970 in payment of subscriptions to shares of Automated.

Moreover, the tabulations in our main brief (p. 36) show that the evidence in the record is that between December 16, 1970 and March 2, 1971, Koss received $2,600 in payment for subscriptions to shares of Automated, including the aforesaid two checks totaling $900. Therefore, such entire $2,600 was more than covered by Koss' $3,000 escrow deposit on December 30, 1970.

POINT VI (continued)

THE INDICTMENT SHOULD HAVE BEEN DISMISSED FOR ENTRAPMENT, AS A MATTER OF LAW, WITHOUT SUBMITTING THE ISSUE OF ENTRAPMENT TO THE JURY.

Koss did not ask the Trial Court to submit the issue of entrapment to the jury, because such a submission would imply to the jury that Koss had knowledge of Hellerman's conspiracy, including knowledge of forgeries of the signatures on the stock certificates which Koss guaranteed; and it would imply to the jury that Koss knowingly and willingly participated in Hellerman's conspiracy.

In our main brief, pp. 29-31, we showed that the jury ascribed guilt to Koss for Hellerman's frauds, deeming Koss a part of Hellerman's conspiracy, based on evidence that Koss sold shares to Interstate Equities which Hellerman controlled; evidence that Koss guaranteed forged signatures on stock certificates issued to names taken from telephone directories; and evidence that Koss did the other things listed on page 28 of our main brief.

Koss contended at the trial, and on this appeal, that he did not know of forgeries of the signatures on the stock certificates which he guaranteed; and that he did not knowingly join and participate in Hellerman's conspiracy.

Therefore, Koss contends that the actions of the Government informants, Hellerman and Taylor, in themselves committing the crimes charged in the indictment, requires dismissal of the indictment, as a matter of law, because of such criminal actions by these Government informants, regardless of whether Koss had a

predisposition to join them in committing these crimes, or whether they overcame his scruples and induced him to do so.

In Sherman v. United States, 356 U.S. 369 (1957), a concurring opinion by Mr. Justice Frankfurter, in which Justices Douglas, Harlan and Brennan concurred, stated (pp. 382-383):

> " *** a test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society."

Moreover, there was no evidence that Koss had inclinations to criminality. He had never been convicted of a crime. He had a clean record as a business man, and a family man, he was active in his church. A local business man, and the minister of his church testified to his good reputation in the community (T1695-96; 1858-59).

In the Sherman case, supra, Sherman had two prior convictions for selling and for possessing narcotics. Yet, the Court held that the Government informant entrapped Sherman, as a matter of law, requiring dismissal of the indictment. The Court said (356 U.S. at 375-376):

> " *** a nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time Kalchinian approached him, particularly when we must assume from the record he was trying to overcome the narcotics habit at the time.
>
> The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time,

"the informer then tells the government agent. The set-up is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this."

It is immaterial that the Assistant United States Attorney told Hellerman (A86):

" *** that I could watch the deal and not to do anything wrong in the deal, not participate, just watch it *** ."

Hellerman's and Taylor's non compliance with these Government instructions did not relieve the Government of entrapment responsibility for Hellerman's and Taylor's criminal actions in formulating and taking charge of carrying out the conspiracy charged in the indictment.

In the Sherman case, supra, the Court said (pp. 373-374):

"The Government cannot disown Kalchinian and insist it is not responsible for his actions. Although he was not being paid, Kalchinian was an active government informer who had but recently been the instigator of at least two other prosecutions. Undoubtedly, the impetus for such achievements was the fact that in 1951 Kalchinian was himself under criminal charges for illegally selling narcotics and had not yet been sentenced."

POINT VII (continued)

KOSS WAS SURPRISED AND PREJUDICED BY INSUFFICIENT PRE-TRIAL DISCLOSURE OF GOVERNMENT DOCUMENTS AND TRANSACTIONS, WHICH WERE NOT ALLEGED IN THE INDICTMENT, OR IN THE BILLS OF PARTICULARS.

The Government argued (p. 31):

"Specifically Koss claims he was not informed that the following would be proved against him at the trial: selling 10,000 shares to Hellerman; guaranteeing forged signatures on stock certificates; knowledge of Santis' kick-back to Hellerman; and cashing a forged check for Hellerman. The denial of the portions of his motion for a bill of particulars now complained of would not have informed Koss that the Government would prove he sold 10,000 shares to Hellerman."

Koss would have been informed of the Government's claim that he sold 10,000 shares to Hellerman, if it had given him the information requested in par. 7d of his demand for a bill of particulars, in which he asked whether the Government claims that he received from any person any money or property "other than the consideration provided in the underwriting agreement".

The Government presented evidence at the trial that Hellerman paid Koss $1.50 per share for 10,000 shares; that Hellerman also paid Koss $500 for guaranteeing forged signatures on stock certificates; and that for cashing 3 checks at Koss' bank, Hellerman paid Koss 1% of the face amount of such checks, which were payable to stockholders whose names were taken from telephone directories, and their endorsements on such checks were forged.

Denial of Koss' request in par. 9b for a record of each sale of shares by Hellerman, Taylor, Zardus, and Interstate Equity left Koss without information at the trial to deal with Zardus' records in evidence of alleged transactions between Koss and his firm, Interstate Equity.

Denial of Koss' request in par. 11(f) for information about "checks drawn by Interstate Equity Corporation to order of persons unknown" left Koss without information at the trial to deal with evidence that such checks were issued to names taken from telephone directories, whose endorsements on such checks were forged.

Koss was surprised and prejudiced by such evidence of which he received no pre-trial disclosure. In the pressures of a trial which lasted 13 days, there was no possibility of investigating and ascertaining the facts about such evidence.

The trial went very fast. Many Government exhibits were shown to counsel for only a fleeting moment before they were taken back by Government counsel, so that Koss' lawyer had no opportunity to inform himself of the text or subject matter of such exhibits, or even of the exhibit numbers.

The Government also argued (p. 31):

> " *** the indictment clearly stated that, as means of the conspiracy, signatures were forged on stock certificates and checks *** ."

There is not a word in the indictment, or in the bills of particulars, that signatures were forged on stock certificates and checks.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED, AND THE INDICTMENT SHOULD BE DISMISSED, OR A NEW TRIAL SHOULD BE GRANTED.

October 9, 1974.

Respectfully submitted,

N. GEORGE TURCHIN
of counsel

MORRIS WEISSBERG
Attorney for Appellant.